Supreme Court, U.S.
FILED

No. 04 60 JUL 9 - 2004

OFFICE OF THE CLERK

In The
Supreme Court of the United States

MARTINGALE, LLC,

Petitioner,

v.

THE CITY OF LOUISVILLE; WATERFRONT DEVELOPMENT CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

DONALD L. COX, ESQ.
Counsel of Record
WILLIAM H. MOONEY, ESQ.
LYNCH, COX, GILMAN, & MAHAN, P.S.C.
2200 Aegon Center
400 West Market Street
Louisville, Kentucky 40202
(502) 589-4215
Counsel for Petitioner, Martingale, LLC

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Does the Anti-Injunction Act, 28 U.S.C. § 2283, preclude a federal court from granting a declaratory judgment on federal question issues in a first-filed action, when a state action implicating those issues is subsequently filed?

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

The petitioner has no parent companies or any non-wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
List of Parent Companies and Non-Wholly Owned Subsidiaries	ii
Table of Contents	iii
Table of Authorities	iv
Citations to Opinions Below	1
Jurisdiction	1
Statutes Involved	2
Statement of the Case	2
I. Procedural History of the Case	2
II. Factual Background	4
Reasons for Granting the Writ	5
I. Certiorari is warranted under the applicable standards	5
II. Sixth Circuit decisions are at odds with those of five other circuits regarding the applicability of the Anti-Injunction Act to federal question, declaratory judgment actions which are first-filed in federal court	7
Conclusion	11
Appendix	App. 1

TABLE OF AUTHORITIES

Page

CASES

Barancik v. Investors Funding Corp. of New York, 489 F.2d 933 (7th Cir. 1973) 7, 11

Bunting v. Mellen, 124 S.Ct. 1750 (2004) 6

Denny's, Inc. v. Cake, 364 F.3d 521 (4th Cir. 2004) 10

Garrett v. Hoffman, 441 F. Supp. 1151 (E.D. Pa. 977) 10

Hyde Park Partners v. Connolly, 839 F.2d 837 (1st Cir.1988) 9

Martingale, LLC v. City of Louisville, 361 F.3d 297 (6th Cir. 2004) ..... *passim*

Philip Morris Inc. v. Harshbarger, 946 F. Supp. 1067 (D. Mass. 1996) 9

Prudential Ins. Co. of America v. Doe, 140 F.3d 785 (8th Cir. 1998) 8, 11

Roth v. Bank of Commonwealth, 583 F.2d 527 (6th Cir. 1978), *cert. granted*, 440 U.S. 944 (1979), *cert. dismissed*, 442 U.S. 925 (1979) 7, 11, 12

Royal Ins. Co. of America v. Quinn-L Capital Corp., 3 F.3d 877 (5th Cir. 1993) 8, 10, 11

Standard Microsystems Corporation v. Texas Instrument Inc., 916 F.2d 58 (2nd Cir. 1990) 9

Texas Employers' Ins. Ass'n v. Jackson, 862 F.2d 491 (5th Cir. 1988) 10

Thiokol Chemical Corp. v. Burlington Indus. Inc., 448 F.2d 1328 (3rd Cir. 1971) 10

Travelers Ins. Co. v. Louisiana Farm Bureau Federation Inc., 996 F.2d 774 (5th Cir. 1993) 10

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 2201(a) 2

28 U.S.C. § 2283 ..... *passim*

OTHER AUTHORITIES

Charles Alan Wright, Arthur R. Miller, *Federal Practice and Procedure* vol. 17, § 4222, 507-508 (2d ed., West 2004) 8

Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, *Supreme Court Practice* § 4.4, 197 (6th ed., Bureau of National Affairs Inc. 1986) 6

CITATIONS TO OPINIONS BELOW

The decision of the Sixth Circuit Court of Appeals in this case is dated March 17, 2004 and is reported at 361 F.3d 297. This opinion is also reprinted in the appendix to this Petition beginning at App. 1.

The decision of the Sixth Circuit Court of Appeals denying rehearing is dated April 14, 2004 and appears reprinted in the appendix to this Petition beginning at App. 27.

The opinion of the United States District Court for the Western District of Kentucky is dated June 5, 2002 and is not reported. This opinion appears reprinted in the appendix to this Petition beginning at App. 14.

JURISDICTION

On April 14, 2004, the Sixth Circuit Court of Appeals denied a petition for rehearing after dismissing the Petitioner's case pursuant to 28 U.S.C. § 2283. Jurisdiction was proper in the Sixth Circuit pursuant to 28 U.S.C. § 1291 in that the appeal was from a final decision of the District Court granting Respondents' Motion for Summary Judgment. Jurisdiction in the District Court was proper pursuant to 28 U.S.C. § 1331 as this is an action arising under the Constitution and laws of the United States. This Court's jurisdiction is proper pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the Anti-Injunction Act, 28 U.S.C. § 2283, which provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

This case also involves, in part, the Declaratory Judgment Act, 28 U.S.C. § 2201(a), which provides in part:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

I. Procedural history of the case

This action was initially filed by the Petitioner in the United States District Court for the Western District of Kentucky in April 2001 challenging, primarily on federal law bases, the right of the city of Louisville to condemn a bridge located in interstate commerce across the Ohio River at Louisville, Kentucky, along with any attendant state and federal franchises to maintain and use the bridge. *Martingale LLC v. City of Louisville*, 361 F.3d 297, 300 (6th Cir. 2004). App. at 4. Litigation proceeded apace

in the United States District Court with the Petitioner filing a Complaint, and an Amended Complaint, and the Defendants filing an Answer and Amended Answer. Defendants filed a Motion for Summary Judgment, on July 28, 2001, the same day they filed a state court proceeding seeking to condemn Petitioner's rights in the bridge. App. at 4.

In the Federal Court litigation, issues were raised about the right of the city of Louisville to condemn a federally granted bridge charter; the right of Louisville to take action which interfered with interstate commerce on a bridge over a navigable river; and the impact of an Interstate Commerce Commission order of abandonment of the railway tracks on the bridge in question. App. at 5. The District Court issued its final decision on June 8, 2002 granting a summary judgment dismissing the federal action on the merits. App. at 25. Over six months later on December 11, 2002, the Kentucky Circuit Court[1] decided that the city of Louisville had the right to condemn the bridge. That decision is now on appeal before the Kentucky Court of Appeals. No trial has yet been set on the issue of the value of the bridge.

In the federal appeal, the Sixth Circuit affirmed the dismissal of this action but *not* on the merits as determined by the District Court. Rather, the Sixth Circuit relied instead upon 28 U.S.C. § 2283, the Anti-Injunction Act, holding that the statute removed the power of the District Court to decide the case. The Court held it was of no moment that the federal action was filed first because

[1] The Circuit Court is Kentucky's general trial jurisdiction court.

the state court condemnation action was filed *before* the federal decision was rendered. App. at 12. Because the action did not fall within one of the three exceptions explicitly contained within the statute, the District Court did not have the power to decide action. App. at 8-10. The Sixth Circuit held that, even though Martingale had sought only a declaratory judgment, seeking such relief was tantamount to seeking an injunction which is forbidden by the Anti-Injunction Act. Martingale's petition for rehearing was denied without opinion. App. at 27.

II. Factual Background

In 1872, Congress authorized the Secretary of War to permit the construction of bridges across the Ohio River for various uses including railroad transportation. App. at 15. Using this authority, the Secretary of War specifically approved of the bridge in question. *Id.* The Kentucky General Assembly also granted a perpetual franchise to the Louisville and Jeffersonville (Indiana) Bridge Company in 1888 to "construct, maintain and operate a bridge for the passage of cars, vehicles ... pedestrians and livestock over and across the Ohio River and to charge a toll for the bridge's use". App. at 15-16. In February 1889, the plans of the Bridge Company for the construction of the bridge were approved; construction of the bridge was completed in 1896. App. at 16.

In late 1968, the then owner of the bridge, along with the Penn Central Company, filed an application with the ICC to abandon the use of the bridge for railway purposes. App. at 16. On October 16, 1987, Bridge the Gap purchased the bridge at a sheriff's sale. App. at 17. Thereafter, the Kentucky Court of Appeals determined that the

bridge itself constituted personal property severed from the underlying real property.

Bridge the Gap, the owner of the bridge as a result of the sheriff's sale, attempted to negotiate the sale of the bridge to the City of Louisville's Waterfront Development Corporation which desired to acquire the bridge for use as a pedestrian walkway across the Ohio River. App. at 18. This use was one of the purposes envisioned by the franchises granted in the nineteenth century. Negotiations proved unsuccessful, however, and Bridge the Gap sold its interests in the bridge to Martingale. Martingale envisioned connecting the bridge to a residential condominium to be constructed on the Indiana side of the Ohio River and renovation and use of the bridge in exactly the same fashion envisioned by the Waterfront Development Corporation – as a pedestrian bridge linking Jeffersonville, Indiana and Louisville, Kentucky. In late 2000 and early 2001, negotiations continued with the Waterfront Development Corporation about a potential voluntary acquisition of the bridge. When these negotiations broke down, in April of 2001, this action was filed.

REASONS FOR GRANTING THE WRIT

I. Certiorari is warranted under the applicable standards.

The most common reason for granting a writ of certiorari is the existence of a conflict between the circuits. Rule 17.1 of the Rules of this Court, states that decisions of federal courts of appeal "that conflict with decisions of other sister courts on the same matter constitute one category of cases on which certiorari may be granted."

Justice Stevens recognized this as one of the reasons justifying a grant of certiorari in *Bunting v. Mellen*, 124 S.Ct. 1750, 1754 (2004) ("the second reason justifying a denial of certiorari is the absence of a direct conflict among the Circuits."). Moreover,

> [t]he Supreme Court *usually, but not necessarily*, will grant certiorari where the decision of the federal court of appeals, as to which review is sought, is in direct conflict with the decision of another court of appeals on the same matter . . . One of the prime purposes of certiorari jurisdiction is to bring about uniformity of decisions on these matters among the federal court of appeals. (emphasis in original)

Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, *Supreme Court Practice* § 4.4, 197 (6th ed., Bureau of National Affairs Inc. 1986)

Here, a direct and irreconcilable conflict exists on the issue in question between the United States Court of Appeals for the Sixth Circuit, on the one hand, and the Courts of Appeals for the First, Third, Fifth, Seventh and Eighth Circuits, on the other. In addition, two other Circuits – the Second and Fourth have sided to some extent with the Sixth. Thus, this case starkly presents an issue falling four square within the principles justifying a grant of certiorari.

II. Sixth Circuit decisions are at odds with those of five other circuits regarding the applicability of the Anti-Injunction Act to federal question, declaratory judgment actions which are first-filed in federal court.

In *Martingale*, the Sixth Circuit held that because the District Court action did not fit into one of the three exceptions "imbedded within the statute's text" the action must fail. App. at 8-10. With respect to Martingale's argument that because it only sought declaratory relief, the Anti-Injunction Act was inapplicable, the Court found the argument to be "clever, but unpersuasive." App. at 10. Most importantly, with respect to the timing of filing of the state and federal court actions, the Sixth Circuit held: "the fact that the City did not file the state court lawsuit until after Bridge the Gap and Martingale filed suit in federal district court has no bearing on the applicability of the Anti-Injunction Act." App. at 12. The Court found support for this proposition in its own case of *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 532 (6th Cir. 1978).

This iron-clad, order-of-filing-is-of-no-moment rule holds that as long as the state action is filed before the federal court renders a judgment, the federal court is divested of the authority to act. This rule diverges significantly from the rules established in other circuits in applying the Anti-Injunction Act.

The Seventh Circuit maintains perhaps the clearest conflict with the Sixth Circuit: "[w]e therefore hold that the mandatory prohibition in § 2283 against injunctions staying court proceedings does not apply to state actions commenced after a motion for injunctive relief is filed in the federal court." *Barancik v. Investors Funding Corp. of New York*, 489 F.2d 933, 938 (7th Cir. 1973).

Wright and Miller, have recognized the existence of this conflict between the Sixth and Seventh Circuits: "[t]he Supreme Court granted certiorari to resolve this conflict, but the writ was dismissed when the parties settled their dispute." Charles Alan Wright, Arthur R. Miller, *Federal Practice and Procedure* vol. 17, § 4222, 507-508 (2d ed., West 2004). Also, according to Wright and Miller, later decisions have left the answer still in doubt. *Id.* at n.23.

In *Royal Insurance Company of America v. Quinn-L Capital Corporation*, 3 F.3d 877, 884 (5th Cir. 1993), the Fifth Circuit also recognized the conflict, stating that,

> [a] circuit split exists on the question of whether the [Anti-Injunction] Act has any application where the injunction is sought before a state suit has been filed but is not issued until after the state suit was filed.... Three circuits have adopted the rule that the Act does not apply where the federal suit is filed first.... Two circuits, on the other hand, have held that the Act should be applied to the case as it stands, regardless of the order in which the actions were filed.

Since the decision in *Royal*, one other circuit – the Eighth Circuit – has recognized the conflict and sided with the Fifth Circuit. *Prudential Ins. Co. of America v. Doe*, 140 F.3d 785, 788 (8th Cir. 1998).

Not only is the Sixth Circuit at odds with five other circuits, the other circuits incrementally differ from each other. This divergence of opinion among the circuits concerning the application of the Anti-Injunction Act to first-filed declaratory judgment actions also demonstrates why certiorari should be granted. The positions of the various circuits are summarized below:

First Circuit: Pure First-to-File

The First Circuit has adopted the first-to-file rule, meaning that if the federal action is filed first a subsequent state court action will not trigger the Anti-Injunction Act. *Hyde Part Partners v. Connolly*, 839 F.2d 837, 842 n.6 (1st Cir. 1988); *Philip Morris Inc. v. Harshbarger*, 946 F. Supp. 1067, 1074 (D. Mass. 1996).

Second Circuit: Sixth Circuit, Timing Irrelevant

In *Standard Microsystems Corporation v. Texas Instrument Inc.*, 916 F.2d 58, 61-62 (2nd Cir. 1990), the Second Circuit, in the context of an injunction, considered and applied the Sixth Circuit's reasoning rejecting, as a result, much of the reasoning of the Seventh Circuit.

Third Circuit: First-to-File, if Federal Question

While the Third Circuit acknowledged that in the typical situation a declaratory judgment will be treated as an injunction for the purposes of the Anti-Injunction Act, it has also held:

> But if the state suit is likely to turn on a question of federal law with which a federal court is likely to be more familiar and experienced than the state court, and if the state court does not proceed in normal course to adjudicate the matter or otherwise manifests willingness to hold its hand pending federal decision, on that question we think it is neither necessary nor desirable to construe section 2283 as precluding the federal court from issuing a declaratory judgment on the common federal question.

Thiokol Chemical Corp. v. Burlington Indus. Inc., 448 F.2d 1328, 1332 (3rd Cir. 1971). This ruling looks to the character and purpose of the suit in addition to the policy underlying the Anti-Injunction Act before making a determination of the applicability of the Act to a federal court in a first-filed action. See, *Garrett v. Hoffman*, 441 F. Supp. 1151, 1156 (E.D. Pa. 1977).

Fourth Circuit: Sixth Circuit, Timing Irrelevant

Denny's, Inc. v. Cake, 364 F.3d 521, 529-532 (4th Cir. 2004) recognized the existence of a conflict between the Circuits and adopted the Sixth Circuit's timing is irrelevant rule.

Fifth Circuit: Comity

In *Texas Employers Ins. Assoc. v. Jackson*, 862 F.2d 491, 506 (5th Cir. 1988), the Court invoked a sort of comity analysis in deciding that a declaratory judgment action could properly proceed in the face of a § 2283 challenge. A later Fifth Circuit case recognized and expanded upon this decision. *Travelers Ins. Co. v. Louisiana Farm Bureau Fedn., Inc.*, 996 F.2d 774, 776 (5th Cir. 1993). The Fifth Circuit in *Royal Ins. Co. of America*, 3 F.3d at 886, applied the same analysis in determining that "[w]here the federal case is filed substantially prior to the state case, and significant proceedings have taken place in the federal case, we perceive little, if any, threat to our traditions of comity and federalism."

Seventh Circuit: First-to-File

As pointed out above, the Seventh Circuit, speaking through now Justice Stevens, has applied an iron-clad, first-to-file rule in *Barancik*, 489 F.2d at 938.

Eighth Circuit: Fifth Circuit, Comity

The Eighth Circuit approved of the Fifth Circuit's reasoning in *Royal* when holding that a District Court had discretion to hear a declaratory judgment action which predated a state action. *Prudential Ins. Co. of America v. Doe*, 140 F.3d 785, 788 (8th Cir. 1998).

The Sixth Circuit never considered the merits of these decisions but relied instead on its controversial and long standing *Roth* decision. In applying the Anti-Injunction Act, most circuits, other than the Sixth, make some type of exception for first-filed declaratory judgment actions, particularly when a federal question is involved.

The United States Supreme Court should resolve this conflict between the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Circuits.

CONCLUSION

The Anti-Injunction Act regulates an important intersection between the federal and state courts, albeit with language that is at once opaque and transparent. The exceptions contained in the statute are far clearer than the statute itself. The Sixth Circuit in its *Roth*, and now *Martingale* decisions, has greatly expanded the scope of the Anti-Injunction Act beyond its plain meaning. In so doing, the Sixth Circuit has placed itself at odds with five

other circuits. Those circuits, while disagreeing with *Roth*, and now *Martingale*, have in turn adopted at least three different interpretations of the Anti-Injunction Act which are themselves, contradictory.

Following the initial issuance of the *Roth* decision, the United States Supreme Court decided to resolve the conflict that then existed between the Sixth and Seventh Circuits. See, *Roth v. Bank of Commonwealth*, *cert. granted*, 440 U.S. 944 (1979), *cert. dismissed*, 442 U.S. 925 (1979).

An even stronger reason exists today to resolve the striking conflicts between the circuits, particularly in view of the more recent decisions from the First, Third, Fifth and Eighth Circuits which have further splintered the interpretation and application of the Anti-Injunction Act.

For the foregoing reasons, the Petitioner respectfully prays that its Petition for a writ of certiorari be granted.

Respectfully submitted,

DONALD L. COX
Counsel of Record
WILLIAM H. MOONEY
LYNCH, COX, GILMAN & MAHAN, P.S.C.
2200 Aegon Center
400 West Market Street
Louisville, KY 40202
(502) 589-4215
Counsel for Petitioner, Martingale, LLC

361 F.3d 297

United States Court of Appeals,
Sixth Circuit.

MARTINGALE LLC; Bridge the Gap, Inc.,
Plaintiffs-Appellants,
v.
CITY OF LOUISVILLE;
Waterfront Development Corporation,
Defendants-Appellees.

No. **02-5895.**

Argued: Oct. 22, 2003.
Decided and Filed: March 17, 2004.
Rehearing Denied April 14, 2004.

Donald L. Cox (argued and briefed), William H. Mooney (briefed), Christina M. Heavrin, Lynch, Cox, Gilman & Mahan, Louisville, KY, Theodore L. Mussler, Jr. (briefed), Mussler & Associates, Louisville, KY, for Plaintiffs-Appellants.

John L. Tate (argued and briefed), Emily R. Hartlage (briefed), Stites & Harbison, Louisville, KY, J. David Morris (briefed), City of Louisville, Louisville, KY, Jason P. Thomas, Stites & Harbison, Frankfort, KY, for Defendants-Appellees.

Before: BOGGS, Chief Judge; GIBBONS, Circuit Judge; GWIN, District Judge.*

---

* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

OPINION

GWIN, District Judge.

In this case, Martingale, LLC ("Martingale") and Bridge the Gap, Inc. ("Bridge the Gap") appeal the district court's ruling permitting the City of Louisville ("City") and the Waterfront Development Corporation to condemn a structure known as the Big Four Bridge. The Big Four Bridge connects Jeffersonville, Indiana with Louisville, Kentucky. The City and the Waterfront Development Corporation wish to use the bridge as part of a public park, but Martingale and Bridge the Gap contend that the City has no legal power to condemn the bridge.

For the following reasons, the district court's decision is AFFIRMED.

I. Background

The story of this case begins in 1888, when the Kentucky General Assembly chartered the Louisville and Jeffersonville Bridge Company ("Bridge Company"). The Bridge Company's charter provided it the "right and power to construct, maintain and operate" a bridge to make rail connections between the railroad lines on each side of the Ohio River. A year later, the Bridge Company approved final plans for the bridge, and in 1895, construction was completed.

In 1927, the Cleveland, Cincinnati, Chicago, and St. Louis Railroad Company (known as the "Big Four Railroad Company") acquired an interest in the bridge from the Bridge Company. Over the following two years, the bridge and its approaches were rebuilt. Years later, in 1955, the

Bridge Company and Big Four merged, making Big Four the bridge's sole owner and the operator.

Through a series of subsequent mergers, Big Four became a part of the Penn Central Transportation Company ("Penn Central"). In 1968, Penn Central decided that due to its merger with the New York Central Railroad Company, certain rail lines were surplus, and that continuing to operate these lines would be a "financial burden . . . and an undue burden on interstate commerce." The rail line crossing the bridge was one such line. A year later, the Interstate Commerce Commission ("ICC") approved Penn Central's application to abandon the bridge. In 1969, the rail line spanning the bridge was thus abandoned.[1]

Five years later, the bridge's approaches were removed. The bridge remains in this condition today, completely inaccessible to humans. For the past thirty years, the bridge has not been functional.

The bridge's abandonment did not stop the transfer of the bridge. Penn Central Transportation Company went bankrupt in 1970 and transferred all of its properties other than operating railroads to the Penn Central Corporation. But the Penn Central Corporation did not keep the bridge, either. In 1982, Charles R. Hammond ("Hammond") acquired the bridge and then transferred it to the Louisville and Jeffersonville Bridge Corporation

---

[1] The record is not clear on what exactly was abandoned. One way to read the record indicates that only the rail line was abandoned, and that the ICC proceeding had no effect on the bridge. Another interpretation holds that Penn Central abandoned the bridge when it abandoned the rail line. Regardless, this ambiguity does not affect our resolution of the case.

("Bridge Corporation"), of which he was president. Hammond then transferred all of the real property associated with the bridge, but not the bridge itself, to the Kentucky Real Estate Holding Corporation.

In 1987, Bridge the Gap acquired the bridge at a Sheriff's sale for $10,300. The Waterfront Development Corporation purchased the real estate surrounding the bridge pylon on the Kentucky side of the river in 1995. In 2000, Bridge the Gap sold its interest in the bridge to Martingale for $400,000, retaining only the right to display holiday lights on the bridge for a ten-year period.[2]

Hoping to use the bridge as a pedestrian walkway as a part of the City's Waterfront Park, the City of Louisville passed a resolution authorizing condemnation of the bridge on November 28, 2000. In April 2001, Bridge the Gap and Martingale sued in the United States District Court for the Western District of Kentucky. Their suit sought a declaratory judgment of their right to insulate the bridge from condemnation, an injunction restraining the City of Louisville and the Waterfront Development Corporation from condemning the bridge, compensatory damages, costs, and attorneys' fees. In July 2001, the City filed suit in Kentucky state court to condemn the bridge.

---

[2] Because the sale contract was contingent upon the grant of certain permits from the City and the Waterfront Development Corporation, the sale may not have been consummated. However, Martingale apparently has at least an equitable lien on the Bridge under the terms of the contract.

On June 5, 2002, the district court entered summary judgment in favor of the City and the Waterfront Development Corporation. The court reasoned that: (1) the bridge is not in interstate commerce; (2) the Rivers and Harbors Act does not prohibit condemnation of the bridge; (3) the bridge's status as a post route does not prohibit condemnation; and (4) the plaintiffs' alleged franchises had been forfeited in 1969 when the ICC permitted Penn Central to abandon the bridge. Additionally, the district court held that even if the plaintiffs possessed the alleged franchises, this was no bar to condemnation because the City and the Waterfront Development Corporation could condemn the franchises and pay the plaintiffs reasonable compensation for them. Plaintiffs Martingale and Bridge the Gap now appeal the district court's grant of summary judgment.

II. Summary of the Parties' Arguments

Martingale and Bridge the Gap argue that summary judgment was inappropriate because they presented enough evidence to the district court to create issues of material fact with regard to: (1) whether the bridge is in interstate commerce, and if so, whether the City's attempt to condemn it is an impermissible burden on interstate commerce; (2) whether the bridge and any franchises to operate it were abandoned as a matter of law under the ICC's procedures for abandoning a rail line; (3) whether a municipality in Kentucky can condemn a federal, Kentucky, or Indiana franchise to own and operate bridge over the Ohio River; and (4) whether the City of Louisville can condemn personal property for use in a park.

The City of Louisville and the Waterfront Development Corporation respond by arguing that there are no issues of material fact regarding any of the above-mentioned issues, and that the district court correctly granted judgment in their favor as a matter of law. Additionally, the City and the Waterfront Development Corporation say that the Anti-Injunction Act, 28 U.S.C. § 2283, prohibits this Court from enjoining a state court condemnation proceeding.

The Court analyzes these arguments below.

III. Standard of Review

An appellate court reviews a district court's grant of summary judgment *de novo*. *Doren v. Battle Creek Health Sys.*, 187 F.3d 595, 597 (6th Cir.1999). Summary judgment is appropriate where the evidence submitted shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-moving party's case. *Waters v. City of Morristown*, 242 F.3d 353, 358 (6th Cir.2001). A fact is material if its resolution will affect the outcome of the lawsuit. *Daughenbaugh v. City of Tiffin*, 150 F.3d 594, 597 (6th Cir.1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

Once the moving party satisfies its burden, the burden shifts to the non-moving party to set forth specific facts showing a triable issue. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). It is not sufficient for the non-moving

party merely to show some possibility of doubt as to the material facts. *Id.*

In deciding a motion for summary judgment, the court views the factual evidence and draws all reasonable inferences in favor of the non-moving party. *National Enters., Inc. v. Smith,* 114 F.3d 561, 563 (6th Cir.1997). Ultimately the Court must decide "whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Terry Barr Sales Agency, Inc. v. All-Lock Co.,* 96 F.3d 174, 178 (6th Cir.1996) (internal quotations omitted).

IV. Analysis

The City and the Waterfront Development Corporation assert that even if Martingale and Bridge the Gap's arguments are meritorious, the federal Anti-Injunction Act, 28 U.S.C. § 2283, barred the district court from granting the requested relief. If the City and the Waterfront Development Corporation are correct, then we need not reach the merits of the case with respect to Martingale and Bridge the Gap's claims for declaratory and injunctive relief. For this reason, we open our analysis with this issue.

The district court did not address the Waterfront Development Corporation and the City's Anti-Injunction Act argument. Regardless, this Court may consider it. This would be the case even if the parties did not raise the issue. *See, e.g., Gloucester Marine Rys. Corp. v. Charles Parisi, Inc.,* 848 F.2d 12, 15 (1st Cir.1988); *Hickey v. Duffy,* 827 F.2d 234, 243 (7th Cir.1987).

According to the City and the Waterfront Development Corporation, the Anti-Injunction Act forbade the district court from granting the relief that Martingale and Bridge the Gap requested. The City and the Waterfront Development Corporation claim that the Anti-Injunction Act bars relief because Martingale and Bridge the Gap seek injunctive relief and because their claims do not fit into any of the Anti-Injunction Act's three exceptions.

In response, Martingale and Bridge the Gap assert that the Anti-Injunction Act is inapplicable because they seek declaratory relief in addition to an injunction. Additionally, they argue that the Anti-Injunction Act cannot apply because they requested that the injunction be directed against the City and the Waterfront Development Corporation, not against the state courts. Finally, Martingale and Bridge the Gap assert that the Anti-Injunction Act does not prohibit injunctions that forbid the commencement of state court proceedings.

We now turn to these arguments, using the text of the Anti-Injunction Act as a starting point. The Anti-Injunction Act states in full:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283. The Supreme Court has, on several occasions, recognized that the Anti-Injunction Act creates "an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions." *Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs,* 398 U.S. 281, 286-87, 90

S.Ct. 1739, 1743, 26 L.Ed.2d 234 (1970); *see also Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630-31, 97 S.Ct. 2881, 2886, 53 L.Ed.2d 1009 (1977). These three exceptions, embedded within the statute's text, permit injunctions against state court proceedings (1) where Congress expressly authorizes, (2) where necessary in aid of the court's jurisdiction, and (3) where necessary to protect or effectuate the court's judgments. *See* 28 U.S.C. § 2283.

Martingale and Bridge the Gap fit into none of the Act's exceptions. First, the parties do not assert, nor do we find, that Congress expressly authorizes injunctions against state courts in the Rivers and Harbors Act, 33 U.S.C. §§ 401 *et seq.*

Second, the injunction they seek is not necessary in aid of the court's jurisdiction. Courts have applied this second exception in only two scenarios: where the case is removed from the state court, and where the federal court acquires in rem or quasi in rem jurisdiction over a case involving real property before the state court does. *See, e.g.*, 17 Wright, Miller, & Cooper, *Federal Practice & Procedure: Jurisdiction 2d* § 4225, at 528 (1988); Erwin Chemerinsky, *Federal Jurisdiction*, § 11.2.3, at 699-700 (3d ed.1999). Neither of these scenarios applies in this case.[3] Further, the existence of a federal right not to have

[3] Although this case does involve aspects of real property law, jurisdiction over these parties is based on in personam, rather than in rem, principles. Therefore, the "in aid of jurisdiction" exception does not apply. *See Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 641-42, 97 S.Ct. 2881, 53 L.Ed.2d 1009 (1977) (declining to apply the "necessary in aid of jurisdiction" exception where the federal and state actions were based on in personam jurisdiction, and noting that "[t]he traditional notion is that in personam actions in federal and state court may

(Continued on following page)

property taken without just compensation does not render equitable relief necessary in aid of the federal courts' jurisdiction. First of all, Martingale and Bridge the Gap have failed to show a violation of this right. Second, the Supreme Court has noted that "when a state proceeding presents a federal issue, even a pre-emptive issue, the proper course is to seek resolution of that issue by the state courts." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50, 108 S.Ct. 1684, 1691, 100 L.Ed.2d 127 (1988).

Finally, because there has been no prior federal court decision on the matter of the bridge, Martingale and Bridge the Gap cannot show that an injunction would be "necessary to promote or effectuate [the court's] judgments."

Martingale and Bridge the Gap's arguments against applying the Anti-Injunction Act are unavailing. They argue that the Anti-Injunction Act may bar their request for an injunction, but not their claim for declaratory relief. Martingale and Bridge the Gap's argument is clever, but unpersuasive. Their ultimate goal is to halt the state court condemnation proceedings, a result that

---

proceed concurrently, without interference from either court, and there is no evidence that the exception to § 2283 was intended to alter this balance."); *see also In re Am. Honda Motor Co., Inc., Dealerships Relations Litig.*, 315 F.3d 417, 439 (4th Cir.2003) ("The 'necessary in aid of its jurisdiction' exception to the Anti-Injunction Act is widely understood to apply most often when a federal court was the first in obtaining jurisdiction over a *res* in an *in rem* action and the same federal court seeks to enjoin suits in state courts involving the same *res.*"); *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 806 (9th Cir.2002) (indicating that the most prominent form of the "in aid of jurisdiction" exception is for in rem actions); *In re Diet Drugs*, 282 F.3d 220, 234 (3d Cir.2002).

either an injunction or a declaratory judgment would accomplish equally well. Other parties have tried this ruse, and most courts that have addressed this issue have rejected their argument. *See, e.g., Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788 (5th Cir.2000), *cert. denied* 530 U.S. 1274, 120 S.Ct. 2740, 147 L.Ed.2d 1005 (2000); *U.S. Steel Corp. Plan for Employee Ins. Benefits v. Musisko,* 885 F.2d 1170, 1175 (3d Cir.1989), *cert. denied,* 493 U.S. 1074, 110 S.Ct. 1121, 107 L.Ed.2d 1028 (1990); *Gloucester Marine Rys. Corp.,* 848 F.2d at 15; *Texas Employers' Ins. Ass'n v. Jackson,* 862 F.2d 491, 498-99 (5th Cir.1988) (en banc), *cert. denied,* 490 U.S. 1035, 109 S.Ct. 1932, 104 L.Ed.2d 404 (1989); *Bledsoe v. Fulton Bank,* 940 F.Supp. 804, 808 (E.D.Pa.1996). This Court follows the guidance of these courts and determines that where, as here, declaratory relief would have the same practical effect as an injunction, the Anti-Injunction Act precludes the court from granting a declaratory judgment.

Additionally, Martingale and Bridge the Gap argue that the Anti-Injunction Act does not prevent a court from enjoining the parties from *commencing* state court proceedings, as opposed to enjoining the parties from *proceeding with* already-filed state actions. They are correct. However, this is of no moment to the instant case because the City filed its condemnation action in July 2001. Because the condemnation action has been pending since that time, the Anti-Injunction Act prohibits any federal court from granting the declaratory or injunctive relief that Martingale and Bridge the Gap seek. In other words, an injunction issued anytime after July 2001 would not prevent the parties from commencing state court litigation; it would stop the parties from proceeding with

existing state court litigation, which is exactly what the Anti-Injunction Act prohibits.

The Court finds support for this analysis in its own precedent. In *Roth v. Bank of the Commonwealth,* 583 F.2d 527 (6th Cir.1978), state court litigation commenced after the federal suit was filed. The district court relied on a Seventh Circuit precedent to grant an injunction.

This Court reversed, concluding,

> we are led inevitably to the conviction that the logic of [the Seventh Circuit's opinion in] *Barancik* [*v. Investors Funding Corp.*, 489 F.2d 933 (7th Cir.1973)] (which in effect says that state proceedings which are commenced in fact are not commenced in law if commenced after the time the judicial power of the federal court was invoked) amounts to precisely that type of judicial improvisation which the Supreme Court has warned us to avoid.

Id. at 534. Therefore, the fact that the City did not file the state court lawsuit until after Bridge the Gap and Martingale filed suit in the federal district court has no bearing on the applicability of the Anti-Injunction Act. For these reasons, we conclude that the Anti-Injunction Act applies and that the district court lacked the power to grant Martingale and Bridge the Gap's requested injunctive and declaratory relief.

The injunctive and declaratory relief sought by Martingale and Bridge the Gap is clearly the heart of this case. Yet, included in the prayer for relief in plaintiffs' "Complaint for Declaration of Rights and Injunctive Relief" is a request for compensatory damages and attorneys' fees. A brief mention of monetary injury "in the form of lost

business opportunities and attorneys fees" is included elsewhere in the complaint. The complaint alleges no further facts in support of this relief and fails to allege any claim or theory of recovery for which plaintiffs seek compensatory damages or attorneys' fees.[4] The complaint fails to allege a claim for intentional interference with prospective contractual relations under Kentucky law. *See Nat'l Collegiate Athletic Ass'n v. Hornung,* 754 S.W.2d 855, 858-59 (Ky.1988) (requiring allegations of an improper motive, consisting of malice or some wrongful conduct on behalf of defendant). Likewise, the complaint fails to allege a claim for a Takings Clause violation. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 194, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) (requiring an allegation of a deprivation of due process or a denial of fair compensation). Because this stray request for monetary relief is not accompanied by any alleged claim on which the relief could be based, our determination that the Anti-Injunction Act bars declaratory and injunctive relief concludes the case. It is unnecessary for us to reach the issues on which the district court based its decision.

We therefore AFFIRM the district court's decision to grant summary judgment in favor of the City of Louisville and the Waterfront Development Corporation.

---

[4] Moreover, the appellate briefs do not mention compensatory damages or attorney's fees.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

MARTINGALE, LLC, et al. PLAINTIFFS

v. CIVIL ACTION NO. 3:01CV-255-S

CITY OF LOUISVILLE, et al. DEFENDANTS

MEMORANDUM OPINION

This action seeks to enjoin the City of Louisville ("the City") from condemning the structure known as the Big Four Bridge ("the Bridge")[1], which spans the Ohio River between Louisville, Kentucky and Jeffersonville, Indiana. The plaintiffs, Martingale, LLC and Bridge the Gap, Inc. (collectively "the plaintiffs") contend that the City does not have the legal authority [sic] condemn the Bridge. The City and the Waterfront Development Corporation, both defendants, move for summary judgment on the ground that there is no legal impediment to condemnation because the Bridge is an abandoned structure.

A party moving for summary judgment has the burden of showing that there are no genuine issues of fact and that the movant is entitled to summary judgment as a matter of law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 151 60, 90 S. Ct. 1598, 16 L. Ed. 2d 142 (1970); *Felix v. Young*, 536 F.2d 1126, 1134 (6th Cir. 1976). Not every

[1] The complaint seeks declaratory and injunctive relief. There was no condemnation action pending at the time this action was filed. The City has since filed such a suit.

factual dispute between the parties will prevent summary judgment. The disputed facts must be material. They must be facts which, under the substantive law governing the issue, might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986). The dispute must also be genuine. The facts must be such that if they were proven at trial, a reasonable jury could return a verdict for the non-moving party. *Id.* at 2510. The disputed issue does not have to be resolved conclusively in favor of the non-moving party, but that party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968). The evidence must be construed in a light most favorable to the party opposing the motion. *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425 (6th Cir. 1962).

I. Facts

The pertinent facts in this matter are undisputed.

In 1872, Congress authorized the United States Secretary of War to permit bridges to be erected across the Ohio River for various uses including railroad transportation.[2] In 1888, the Kentucky General Assembly chartered the Louisville and Jeffersonville Bridge Company (the "Bridge Company").[3] The General Assembly granted the Bridge Company "the right and power to construct, maintain and operate" a bridge to make rail

---

[2] Act of December 17, 1872, Ch. IV, 17 Stat. 398.

[3] 1888 Ky. Acts 212.

connections between the lines of railroad on each side of the Ohio River.[4] In February, 1889, the plans of the Bridge Company for the construction of the Bridge were approved.[5] The Bridge was completed in 1895.

On October 4, 1927, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company (known as the "Big Four") became the sole owner of the Bridge Company.[6] In 1928 and 1929, the bridge and approaches were rebuilt.[7] The Bridge Company operated the property until March 2, 1955, when the Bridge Company was merged into the Big Four which became the Bridge's owner.[8] Beginning on February 1, 1968, Penn Central Company became an additional authorized operator of the Bridge.[9] In late 1968, Big Four and Penn Central Company filed an application with the United States Interstate Commerce Commission ("ICC") to abandon the Bridge on the ground that its continued operation would constitute a "financial burden . . . and an undue burden on interstate commerce."[10] The abandonment was sought "because the merger of the former New York Central Railroad Company . . . into . . . Penn Central has made said segments of line, which include a bridge across the Ohio River, surplus facilities no longer needed for the present and future convenience of

---

[4] *Id.* and ICC Abandonment Application and Questionnaire, 2A.

[5] Declaration of William C. Endicott, Secretary of War, February 28, 1889.

[6] ICC Abandonment Application and Questionnaire, 2A.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Application for Abandonment, pg. 12, ¶ 18A.

the public."[11] The ICC approved the abandonment on May 1, 1969, concluding that

> operations are no longer needed over these lines as service is furnished over alternate facilities of applicant; that no user will be adversely affected by the abandonments; that substantial savings will result to applicants upon abandonments; and that continued maintenance and operation of the lines would impose an undue and unnecessary burden on applicant and upon interstate commerce.[12]

In 1974, the approaches to the Bridge were removed, leaving only the piers and superstructure of the Bridge. The removal of the approaches rendered the Bridge inaccessible and unusable.

On October 16, 1987, Bridge the Gap, Inc. purchased the Bridge at a sheriff's sale. It did not acquire any real property on the Kentucky shore; only the piers in the river and the bridge superstructure such as it was, unconnected to any approach on either end.[13]

On February 16, 1995, the Waterfront Development Corporation ("WDC") purchased the real property on the Kentucky side of the Ohio River adjacent to the Bridge.[14]

WDC later unsuccessfully sought to purchase Bridge the Gap's interest in the Bridge, but on December 7, 2000,

---

[11] Application for Abandonment, pg. 2, ¶ e.

[12] Certificate and Order of Abandonment, May 1, 1969.

[13] Jefferson Circuit Court Orders of November 24, 1987 and May 9, 1988.

[14] Deed, Kurt Bendl to WDC, February 16, 1995.

Bridge the Gap sold its interest to Martingale, LLC, retaining the right to display holiday lights on the Bridge for a period of ten years.[15]

WDC envisions the renovation and development of the Bridge as a pedestrian bridge linking Louisville with Jeffersonville as part of its development of Louisville's Waterfront Park.

II. Analysis

Having been unable to negotiate the purchase of the Bridge from either Bridge the Gap or Martingale, LLC, the City, on behalf of WDC, sought to acquire it by condemnation. Kentucky Revised Statutes ("KRS") 97.257 states:

> Whenever property shall be needed by any city of the first class for any park, playground, or community center purpose contemplated in KRS 97.250 to 97.257, either within or beyond the boundaries of such city, in the county in which such city is located, the director of parks and recreation may, with the consent of the legislative body of such city, order the condemnation of such property in the manner provided in the Eminent Domain Act of Kentucky.

The Eminent Domain Act, KRS 416.540, et seq., provides:

> Whenever any condemnor cannot, by agreement with the owner thereof, acquire the property right, privileges or easements needed for any of the uses or purposes for which the condemnor is

[15] Contract of Sale, Bridge the Gap, Inc. to Martingale, LLC, December 15, 2000.

> authorized by law, to exercise its right of eminent domain, the condemnor may condemn such property, property rights, privileges or easements pursuant to the provisions of KRS 416.550 to 416.670.

KRS 416.550[16]

A.

The plaintiffs contend that the City cannot condemn a bridge that is in interstate commerce. They rely to section 401 of the Rivers and Harbors Act, 33 U.S.C. § 401, et seq., for the proposition that it is not within the power of either state or local government to effect the condemnation of a bridge over navigable waters which forms a part of interstate commerce.

First, the contention that the Bridge is in interstate commerce is ludicrous. The structure is usable only by pigeons and other winged creatures. It is inaccessible to humans, except those with extremely long ladders. The Bridge has not been in use as a means of transportation across the river for over 30 years. The approaches having been removed, the Bridge cannot be used as a means of transporting goods or people.

The Bridge was formally abandoned by the ICC, which concluded that continued maintenance and operation would constitute an undue burden on interstate commerce. When the ICC's regulatory control over the

---

[16] The plaintiffs would have the court limit the right of condemnation to real property. The plain language of the statute does not suggest such a limitation and this court will decline to give it such a reading.

Bridge was relinquished, interstate commerce ceased. *Hayfield Northern R.R. Co. v. Chicago & Northwestern Transportation Co.*, 404 S.Ct. 2610 (1984).[17] We reject utterly the notion that the Bridge forms any part of interstate commerce.

Second, the plaintiffs have failed to demonstrate that the Rivers and Harbors Act prohibits the City's condemnation of the Bridge. No specific section of the Act is cited, and possibly for good reason. Our own review indicates that the Act does not prohibit condemnation. We conclude that the plaintiffs' reliance on the Rivers and Harbors Act is misplaced.

B.

The plaintiffs contend that condemnation is precluded by the Commerce Clause and the Post Roads Clause of the United States Constitution.[18] Bridges built over navigable waters were designated as "post routes," in accordance with the Act of Dec. 17, 1872, ch. IV, 17 Stat. 398 and the Bridge Act of 1906.[19] The plaintiffs argue that once a post route is designated, it is in interstate commerce and cannot thereafter be condemned. No authority is cited for this proposition.

---

[17] We reject the contention that the December display of holiday lights on the remaining bridge structure constitutes ongoing commercial use of the Bridge in interstate commerce.

[18] U.S. Const. Art. I, § 8, cl. 3 and cl. 7.

[19] 33 U.S.C. § 492.

Designation of the Bridge as a post route in the late 1800s does not preclude its abandonment and condemnation in 2002 after many years of disuse. We find nothing in the Constitution which requires the perpetuation of an inaccessible, abandoned bridge structure in order to preserve a long-unused post route designation.

C.

The plaintiffs claim that franchises from the United States and from the states of Kentucky and Indiana preclude condemnation of the Bridge. They urge that these franchises, granted to construct and operate the Bridge, remain viable and have passed with the structure to its current owner. The plaintiffs have provided a copy of the Kentucky legislation granting franchise rights to the Bridge Company to operate the Bridge and to collect tolls.[20] They have also provided a copy of generalized legislation from the State of Indiana authorizing the formation of associations for the purpose of building bridges and collecting tolls. The Indiana statute is not specific to the bridge in question here, but was applicable to it.[21] The plaintiffs contend that once granted, these franchises are perpetual and may not be terminated by the City. For a number or [sic] reasons, the court finds this argument unavailing.

---

[20] Acts of the General Assembly, KY, § 2 (1888).

[21] Indiana General Laws, Chapter VIII, March 2, 1875.

(1)

The cases cited by the plaintiffs involved franchises that were operational at the time revocation or restriction of the franchise was attempted. *See, ie., City of Louisville v. Cumberland Telephone & Telegraph Co.*, 224 U.S. 649, 32 S.Ct. 572, 56 L.Ed, 934 (1912) (city attempted to revoke franchise for telephone systems); *Grand Trunk R.R. Co. v. City of South Bend*, 227 U.S. 544, 33 S.Ct. 303, 57 L.Ed. 633 (1913) (city sought to preclude the laying of additional track by holder of franchise for freight and passenger trains); *Williams v. Citizens' Ry. Co.*, 29 N.E. 408 (Ind. 1891) (franchise holder for electric street railway sought to preclude relocation of a building that would destroy railway's wires and poles).

In this instance, the claimed franchise rights are for the transport of goods and persons across the Ohio River and for the collection of tolls. These are rights which have not been exercised since the ICC approved abandonment over 30 years ago. The Bridge has been inaccessible for over 25 years. The facts here differ markedly from those cases cited by the plaintiffs.

(2)

We believe that the franchises were forfeited in 1969 when the application for abandonment of the Bridge was granted by the ICC. The ICC declared at the time that continued operation of the Bridge would constitute an undue burden on interstate commerce and should no longer be permitted. A franchise may be deemed forfeited when it ceases to serve the public. In *Jack v. Williams*, 113 F.823 (D.S.C. 1902), the court stated:

> If a corporation is created, the franchise to be a corporation can be given only by the sovereign . . . The consideration for these acts of the sovereign is the utility of the enterprise to the public. To be thus useful to the public, the road must be kept in such a condition that life and property both must be made as safe as practicable . . . Whilst thus serving the public, however, no corporation or private person is obliged to continue the service without a reasonable remuneration . . . The question is not as to the existence of the duty, but as to its extent and qualifications. The duty of a railroad company is not more than to meet the public wants. If trains run at reasonable and moderate fares, and cannot be supported, it is because they are not needed . . . In such case the company may cease operating the road, unless this be contrary to the express terms of the charter . . . [T]hey exercised this option, and forfeited the franchises . . .

Jack, 113 F. at 826-31.[23]

(3)

The City contends that it does not seek to revoke the franchises. Rather, it seeks to acquire any existing rights, including franchise rights, by eminent domain. In *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1893), where a lock and dam were

---

[23] The plaintiffs suggest that the franchises should be deemed perpetual because the association formed under the Indiana grant was perpetual in duration. They cite no authority for the contention that the duration of the life of the association defines the duration of a franchise granted by a state or the Federal government.

condemned, payment of compensation for the value of an attendant active franchise was authorized. So, even if the franchises were not forfeited, their value, if any, can be qualified and compensated in the condemnation litigation. We conclude that, if the franchises still exist, they are no bar to eminent domain proceedings.

III. Conclusion

The defendants are entitled to summary judgment as to all claims in the amended complaint. A separate order will be entered herein this date in accordance with this opinion.

This 5th day of June, 2002.

/s/ _____
CHARLES R. SIMPSON III,
JUDGE
UNITED STATES DISTRICT
COURT

cc: Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

MARTINGALE, LLC, et al. PLAINTIFFS

v. CIVIL ACTION NO. 3:01CV-255-S

CITY OF LOUISVILLE, et al. DEFENDANTS

ORDER

Motions having been made and for the reasons set forth in the memorandum opinion entered herein this date and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that

1. The motion of the plaintiffs, Martingale, LLC, et al., for leave to file a supplemental brief is **GRANTED**.

2. The motion of the defendants, City of Louisville, et al., for summary judgment is **GRANTED**.

3. The motion of the plaintiffs, Martingale, LLC, et al., for leave to file a second amended complaint is **DENIED AS FUTILE**.

4. The amended complaint is **DISMISSED WITH PREJUDICE**.

There being no just reason for delay in its entry, this is a final order.

IT IS SO ORDERED this 5th day of June, 2002.

/s/ _____
CHARLES R. SIMPSON III,
JUDGE
UNITED STATES DISTRICT
COURT

cc: Counsel of Record

Case No: 02-5895

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
ORDER

(Filed Apr 14, 2004)

MARTINGALE LLC; BRIDGE THE GAP, INC.

Plaintiffs-Appellants

v.

CITY OF LOUISVILLE; WATRFRONT DEVELOPMENT CORPORATION

Defendants-Appellees

BEFORE: BOGGS, Chief Judge, GIBBONS, Circuit Judges and GWIN, District Judge*

Upon consideration of the petition for rehearing filed by the appellant, Martingale LLC.

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

*The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.